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WORKERS COMPENSATION & SELF INSURANCE

Calculating Average Weekly Earnings When a Worker Suffers a Second Compensable Injury

By Patrick Walsh & Tiffany Walsh

The recent decision of the South Australian Employment Tribunal in *Knight v Department for Education* [2019] SAET 64 centred on the correct calculation of a worker's Average Weekly Earnings in the context of a worker suffering a second compensable injury, while working reduced hours in a return to work from a previous compensable injury.

In this matter, the worker sustained a compensable psychiatric injury on 7 April 2011 while working full time as a teacher, when a student came into her classroom, brandishing and 'firing' a replica gun. The worker was receiving income maintenance payments, and eventually returned to work at a different school at 0.4 full time equivalent ("**FTE**"). Then, on 5 April 2017, the worker suffered a recurrence of her injury when another student brandished a replica gun at school. The dispute concerned the correct calculation of the worker's Average Weekly Earnings.

As at the date of the worker's second injury, she was still receiving income maintenance payments supplementary to her earnings from employment. In the twelve months prior to the date of the second injury, the worker had varied between being unfit for work, and working from 0.4 FTE to 0.6 FTE. At the date of the second injury, the worker was undertaking teaching duties at 0.4 FTE, although she was fit for teaching duties at 0.6 FTE.

The worker argued that the income maintenance payments she was receiving with respect to the first injury at the date of the second injury, should be regarded as earnings for the purpose of calculating her Average Weekly Earnings in accordance with Section 5(1) of the ***Return to Work Act 2014*** (SA) ("**the Act**"). The worker further argued that as her earnings had been affected by her first injury, that Section 5(9) of the Act required her Average Weekly Earnings to be set as if they were not so affected – ie, at the full-time rate. Finally, the worker argued that Section 5(6) of the Act applied so that it was not possible to determine her Average Weekly Earnings fairly merely by reference to her earnings in the twelve months prior to 5 April 2017 (given that she was in the process of returning to full-time work at the date of the second injury).

The employer argued that calculation of the worker's Average Weekly Earnings in accordance with Section 5(1) of the Act was fair, and that Sections 5(6) and 5(9) of the Act were not applicable. This was due to the fact that the second injury was an aggravation of the first, and so, in accordance with Section 7(3) of the Act, the second injury was only compensable to the extent of, and for the duration of, the aggravation. Therefore, the worker's Average Weekly Earnings couldn't be calculated by reference to the earnings of full-time employees as this would disregard the restriction in Section 7(3) of the Act.

Both the worker and the employer argued in the alternative that the calculation of Average Weekly Earnings pursuant to Section 5(6) is comparable to an employee in the same employment who works 0.6 FTE, being the certified capacity of the worker at the date of injury.

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In her decision, Her Honour Deputy President Judge Kelly, stated that:

> *"A key change in the RTW Act from that which applied under the repealed Act, is the effective limitation on weekly payments to 104 weeks of weekly payments after the relevant injury, except in the case of seriously injury workers. The interpretation proposed by [the worker] would potentially extend payments, at the rate for a prior injury, up to another 104 weeks. Furthermore in the absence of any time limit the prior injury could go back many years, or even decade, which makes for a very speculative exercise as to whether a prior injury has affected the level of earnings… Further I consider that if the legislature had intended the significant change from the evident intent behind s 4(9) of the repealed Act in the provisions of s 5(9) it would have more clearly designated that change by reference to a "prior injury". As a result I am not persuaded by the submissions on behalf of [the worker]."*

Given that Section 5(6) of the Act is identical to Section 4(6) of the *Workers Rehabilitation and Compensation Act 1986* (SA), Her Honour considered herself to be bound by the decision of *Last v WorkCover Corporation (Australian Fishing Enterprises Pty Ltd)*, so that Section 5(6) couldn't change a worker's Average Weekly Earnings to full-time equivalent in the event of a subsequent injury.

Her Honour further considered that it would not be fair to the worker to have her Average Weekly Earnings in the context of the second injury to be fixed at 0.4 FTE, given that she had capacity to work at 0.6 FTE but that the employer had not provided the additional hours of work to her.

Accordingly, Her Honour decided that the worker's Average Weekly Earnings should be set at the rate of a 0.6 FTE teacher.

This decision makes it clear that in circumstances where workers suffer a further injury before making a return to their pre-injury earnings the correct approach is to:

1. average the worker's earnings from employment over the preceding twelve months; and
2. consider whether Section 5(6) of the Act has any application if the average is unfair.

Section 5(6) of the Act will usually have application where the worker's capacity is higher than the average produced by Section 5(1) of the Act.

If you would like more information in relation to calculation of a worker's Average Weekly Earnings in situations such as these, please contact us for advice and assistance.

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